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In the Supreme Court of the United States

OCTOBER TERM, 1987

ETSI PIPELINE PROJECT, PETITIONER

v.

STATE OF MISSOURI, ET AL.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

STATE OF MISSOURI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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ARGUMENT

In our opening brief, we explained that Section 9 of the Flood Control Act of 1944 (58 Stat. 891) authorizes the Secretary of the Interior to enter into contracts, pursuant to the federal reclamation laws, to supply unutilized irrigation water from the Missouri River's mainstem reservoirs for industrial use. Respondents offer scant challenge to our straightforward construction of Section 9. Instead, they argue that two general provisions of the 1944 omnibus flood control legislation, Sections 6 and 8 (58 Stat. 890, 891), override Section 9 and the specific functional division of authority set forth in the Pick-Sloan Plan. As we show below, respondents' basic premise is fundamentally wrong. Sections 6, 8, and 9 are fully consistent with each other

and with the Pick-Sloan Plan's express division of authority. And as we further demonstrate, respondents' other arguments are equally insubstantial. Our position is plainly reasonable and entitled to judicial respect.

1. *Section 9 of the Flood Control Act authorizes the Secretary of the Interior to enter into contracts to supply unutilized irrigation water for industrial use.* Respondents' arguments travel far afield from the relevant statutory provisions in this case. We therefore begin by resummarizing our basic position. As we explained in our opening brief (at 2-13), Section 9 of the Flood Control Act approved the Pick-Sloan Plan, a comprehensive program, jointly administered by the Army and the Interior Department for the development of the Missouri River Basin's water resources. That Plan, which represents a compromise between the interests of the arid and semi-arid upper basin states and the more humid lower basin states, consists of three congressional documents: (1) the Pick Plan, H.R. Doc. 475, 78th Cong., 2d Sess. (1944), a flood control proposal prepared by the Army Corps of Engineers; (2) the Sloan Plan, S. Doc. 191, 78th Cong., 2d Sess. (1944), a reclamation proposal prepared by the Interior Department's Bureau of Reclamation; and (3) the Corps-Bureau report, S. Doc. 247, 78th Cong., 2d Sess. (1944), a jointly prepared document that coordinates the Army and Interior plans. These three documents collectively provide the general framework for interagency development of the Missouri River Basin's water resources, including Lake Oahe, the mainstem reservoir involved here. See U.S. Br. 2-13.

The question in this case is whether the Secretary of the Interior may supply ETSI Pipeline Project with water from Lake Oahe that is presently impounded but not needed for irrigation purposes. As we explained in our opening brief (at 23-34), Section 9 grants the Secretary that power. Section 9(a) approves the Pick-Sloan Plan, which in turn gives the Secretary of the Interior explicit authority to manage the reclamation aspects of the mainstem reservoirs.[1] Section 9(c) then identifies the body

[1] For example, the Corps' Pick Plan expressly provides that "utilization of storage reserved for irrigation in all multiple-purpose reservoirs should be in

of law—federal reclamation law—that governs *how* the Secretary shall exercise his authority.[2] The Secretary may therefore supply unutilized irrigation water from Lake Oahe in accordance with provisions of the Reclamation Project Act of 1939, a federal reclamation law that permits the Secretary to provide unneeded irrigation water for miscellaneous purposes. See 43 U.S.C. 485h(c).

a. *Section 9(a).* Respondents do not dispute that Section 9(a) approved the Pick-Sloan Plan, that Congress envisioned joint Army-Interior administration of the Plan, or that the three referenced documents comprising the Plan specify that the Secretary of the Interior shall have responsibility for the utilization of irrigation storage at Missouri River mainstem reservoirs. They suggest, instead, that the congressionally approved documents do not provide a reliable guide to congressional intent (Mo. Br. 24-25, 33; KCS Ry. Br. 14-15, 22-23). Respondents treat the Pick Plan, the Sloan Plan, and the Corps-Bureau coordinating document as mere "legislative history" (Mo. Br. 33) or "agency comments" (KCS Ry. Br. 14). But plainly, these documents, which collectively constitute a *congressionally approved plan,* are entitled to much greater weight. They establish, in this Court's words, the "basic policy for the systematic development of a river basin" (*United States ex rel. Chapman* v. *FPC*, 345 U.S. 153, 163 (1953)). In particular, they set forth the basic functional division of authority that Congress determined shall govern the Pick-Sloan Plan. Respondents, at bottom, urge that this Court ignore the most relevant and

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accordance with regulations prescribed by the Secretary of the Interior" (H.R. Doc. 475, *supra,* at 4). The Bureau's Sloan Plan concurs in this division of authority (S. Doc. 191, *supra,* at 3-4, 7-8), further specifying that mainstem reservoirs "should be operated under regulations of the Bureau of Reclamation so far as such functions are concerned" (*id.* at 11). And the Corps-Bureau coordinating document makes this functional division possible by providing that the mainstem reservoirs would be built with sufficient capacity to accommodate the Corps' flood control and navigation objectives and the Bureau's reclamation water needs (S. Doc. 247, *supra,* at 1, 11-12). See U.S. Br. 24-29.

[2] Section 9(c) provides that "reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws" (58 Stat. 891). See U.S. Br. 29-34.

specific indicia of congressional intent on the precise question at issue here. See U.S. Br. 24 & n.39.[3]

b. *Section 9(c).* Respondents simply fail to come to grips with the Secretary of the Interior's interpretation of Section 9(c). As we explained in our opening brief (at 29-34), Section 9(c)'s instruction that the "reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws" (58 Stat. 891), was added to ensure that the Secretary would exercise his responsibilities under the Pick-Sloan Plan in accordance with established reclamation principles. Respondents, however, simply adhere to the court of appeals' conclusion that when Congress used the term "reclamation * * * developments" it referred to physical irrigation works rather than the Secretary's reclamation activities under the Pick-Sloan Plan. See Mo. Br. 29-31; KCS Ry. Br. 26-28. We have discussed in our opening

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[3] Respondents err in contending that we would read Section 9(a) as "incorporat[ing] in full all the language of those documents" (KCS Ry. Br. 22). We stated the role of congressionally approved plans quite clearly in our opening brief: "When Congress approves a proposed plan for such projects, it adopts the basic policy for the systematic development of the river basin set forth in the accompanying reports" (U.S. Br. 24 n.39, citing *Chapman*). This approach leaves the operational details to the discretion of each agency pursuant to its authority under the Flood Control Act and other laws. Respondents acknowledge *Chapman*, but then suggest that the functional division of authority set forth in the Pick-Sloan Plan need not be respected because it is not " 'an integral part of the plan' [345 U.S. at 160]" (Mo. Br. 25 n.30; KCS Ry. Br. 23 n.21). That contention has no merit. The inter-agency division of authority was discussed at length in all three reports (H.R. Doc. 475, *supra*, at 1-9; S. Doc. 191, *supra*, at 1-11; S. Doc. 247, *supra*, at 1-6) and was one of the most important questions raised and resolved in the Pick-Sloan Plan. Respondents' contention that the Pick-Sloan Plan "is silent on industrial use by Interior" (KCS Ry. Br. 23 n.21) is incorrect; the Sloan Plan specifically observed that "[i]n the future there will also be greater requirement for industrial water supplies" (S. Doc. 191, *supra*, at 13) and that "[t]o the extent the uses of water are competitive, the use of water for domestic, agricultural, and industrial purposes should have preference" (*id.* at 10). The other documents also recognized the possibility that stored waters could be applied to industrial use (*e.g.*, H.R. Doc. 475, *supra*, at 7 (Bureau comments)) or "other purposes" (S. Doc. 247, *supra*, at 2, 3). See also U.S. Br. 35-37 & nn.54-55.

brief (at 31-34) why that interpretation is untenable.[4] We further observe here that respondents' construction of Section 9(c) cannot be squared with the provision's syntax. Section 9(c) is worded as a guide to the Secretary's exercise of his powers under the Pick-Sloan Plan; it is not phrased as a grant of authority over physical works. Indeed, if Section 9(c) were written as respondents would have it, the statute would provide that federal reclamation law governs *physical irrigation works* rather than the Secretary's *actions*. The reclamation laws, however, describe the Secretary's authority; they do not, stricly speaking, "govern" physical irrigation works.[5] Thus, it is far more sensible to interpret Section 9(c)'s reference to "reclamation developments" as comprehending all of the Secretary's reclamation activities rather than just dams, pumping stations, or other physical products utilized in those activities.[6]

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[4] As we explained, Congress enacted Section 9(c) to make clear that the Secretary of the Interior's reclamation activities, although approved in a flood control Act, would nevertheless be governed by federal reclamation law (U.S. Br. 30-31). As we further explained, the court of appeals' and respondents' interpretation of Section 9—that it "simply adopts the projects proposed in the Pick-Sloan plan and directs that the reclamation laws apply to those undertaken by the Secretary of the Interior" (Pet. App. 23a-24a)—is inconsistent with the plain language of Section 9(a) which approves the "general comprehensive plans" (58 Stat. 891) and not merely the discrete projects contained therein (U.S. Br. 31-32). Those plans specify that the Secretary of the Interior shall administer the reclamation aspects of the program; they do not limit the Secretary's authority to those physical works that the Bureau of Reclamation has constructed (*id.* at 32). There is simply no reason to believe that Congress enacted Section 9(c) to override a flexible inter-agency plan for cooperation and effectively prevent the Secretary from administering reclamation aspects of Army-constructed facilities. See U.S. Br. 32. Indeed, when Congress wished to describe physical irrigation works in Section 9's other subsections, it specifically used the word "works" (U.S. Br. 33 n.50). And as we further explained, respondents' interpretation would discourage optimal utilization of the stored waters (*id.* at 36-38). Respondents essentially ignore all of these points.

[5] For example, the particular reclamation law at issue here, Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. 485h(c), states that "[t]he Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes" provided that he satisfies certain requirements. This Section, like virtually every other section of the Reclamation Project Act, addresses how the Secretary should exercise his reclamation responsibilities.

[6] Respondents err in arguing that we treat the ETSI contract as a "reclamation development" (Mo. Br. 30; KCS Ry. Br. 26). As our opening brief

c. *Irrigation storage at Lake Oahe.* Finally, in disputing our construction of Section 9, respondents contend that the Pick-Sloan Plan's specification that the Secretary of the Interior shall administer water stored for irrigation purposes does not control here because Lake Oahe does not have any irrigation storage (Mo. Br. 31-32; KCS Ry. Br. 24-25). Respondents are quite plainly wrong. As we explained in our opening brief (at 11-12, 15 n.29, 37, 41 n.62), Lake Oahe was jointly designed by the Army Corps of Engineers and Interior's Bureau of Reclamation to satisfy the needs of both agencies. The final storage capacity of 23.34 million acre feet was specifically selected over the Corps' suggested capacity of 6 million acre-feet to provide, among other uses, for irrigation of 750,000 acres of cropland in the James River Basin (*ibid.*). As a result of postponement or abandonment of proposed (and partially completed) irrigation projects, the projected irrigation needs have not yet materialized (*ibid.*). Interior and the Army have therefore jointly concluded that a portion of the water intended, but not needed, for irrigation is available for other use (*id.* at 16 n.30; see also J.A. 136, 140). Thus, respondents' suggestion that there is no unutilized irrigation storage is without basis.[7]

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explicitly stated, the "reclamation developments" at issue here are the Secretary's *activities* in making irrigation water stored at the mainstem reservoirs usable or available: "Thus, when the Secretary defines the irrigation storage needs at mainstem reservoirs, determines the proper disposition of the resulting impounded water, or enters into contracts to make that water available for a recognized reclamation use * * *, he is engaged in a reclamation development." U.S. Br. 33 (footnote omitted).

[7] Respondents argue (Mo. Br. 31) that there is no irrigation storage at Lake Oahe because the Corps defines four general categories of storage (exclusive flood control, annual flood control and multiple use, carry-over multiple use, and inactive) and includes irrigation water under one of its four general storage categories. As we explained in our opening brief (at 41-42 n.62), the Corps definitions, which are created for independent operating purposes, have no relevance to the availability of unutilized irrigation water: "Plainly, Interior does not lose its authority over water available for irrigation simply because the Army classifies it, for operational purposes, as part of the water available for multiple purposes" (*ibid.*). Respondents further suggest (KCS Ry. Br. 25) that Congress itself must expressly "reserve" water for irrigation. However, nothing in the Flood Control Act requires Congress to take such action; Congress, through its approval of the Pick-Sloan Plan has given Interior authority

2. *Sections 6 and 8 of the Flood Control Act do not override the Secretary's authority under Section 9.* Respondents' principal contention is that Sections 6 and 8 of the Flood Control Act impliedly prohibit the Secretary of the Interior from providing unutilized irrigation water from mainstem reservoirs for industrial use. See Mo. Br. 18, 22; KCS Ry. Br. 16, 18, 28, 32. Their arguments rest, however, on a basic misunderstanding of the origin and interrelationship of the Flood Control Act's provisions. In particular, respondents fail to distinguish between the Flood Control Act's general provisions, such as Sections 6 and 8, which apply to all Army flood control projects, and Section 9's specific authorization of a joint Army-Interior program for the Missouri River Basin. We therefore briefly review the evolution of that legislation, with particular emphasis on the relationship between Sections 6, 8, and 9.

a. *The evolution of the Flood Control Act.* The Flood Control Act of 1944 began as a House omnibus flood control bill (H.R. 4485, 78th Cong., 2d Sess.) to expand the Army Corps of Engineers' national flood control program to more than 50 locations scattered throughout the nation. When the bill emerged from the House Committee on Flood Control, it included provisions giving the Secretary of the Army general authority to construct recreational facilities (§ 3), sell surplus water (§ 4), and regulate flood control and navigation storage (§ 5) for Army flood control projects, including the 56 proposed projects listed near the end of the bill. See H.R. Rep. 1309, 78th Cong., 2d Sess. 6-8, 52-53 (1944). The bill further provided that if the Army determined at some future date that any of the flood control projects could be used for reclamation purposes, the Secretary of the Interior would prescribe regulations for the use of the available storage space (§ 6). See H.R. Rep. 1309, *supra*, at 8, 53.

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to determine the amount of water needed and available for irrigation use. See, *e.g.*, S. Doc. 247, *supra*, at 1 ("The Bureau of Reclamation should have the responsibility for determining the reservoir capacities on the main stem and tributaries of the Missouri River for irrigation, the probable extent of future irrigation, and the amount of stream depletion due to irrigation development.").

The Corps' Pick Plan was one of the 56 projects included in the bill's authorization list (H.R. Rep. 1309, *supra*, at 23-25). See U.S. Br. 4-6. One month after the House committee issued its report, the Interior Department's Bureau of Reclamation published its Sloan Plan. The House debated H.R. 4485 and passed it in essentially the same form proposed by the House committee, following repeated suggestions that the Corps' Pick Plan should be coordinated with the Bureau's Sloan Plan. See U.S. Br. 6-9.

The House's omnibus flood control bill was next submitted to the pertinent Senate subcommittee, where Secretary of the Interior Ickes appeared and proposed amendments to Sections 4 and 6.[8] On June 22, 1944, the Senate subcommittee issued a report that recommended passage of an amended omnibus bill that did not include Secretary Ickes' suggested changes to Section 4 (which was now numbered Section 6) but did include his suggested changes to Section 6 (now numbered Section 8). See U.S. Br. 9-11 & nn. 15, 17. Meanwhile, the Corps and the Bureau worked on the much narrower problem, limited to the Missouri River Basin, of reconciling the Pick and Sloan plans. They ultimately issued their joint report concluding that their respective plans could be coordinated if the agencies exercised shared responsibility – based on each agency's statutory mission and practical expertise – in design as well as administration at each of the multiple purpose mainstem reservoirs. See S. Doc.

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[8] See *Flood Control: Hearings on H.R. 4485 Before a Subcomm. of the Senate Comm. on Commerce*, 78th Cong., 2d Sess. (1944) [hereinafter *H.R. 4485 Senate Hearings*]. Secretary Ickes proposed that Section 4, which permitted the Army to sell surplus water from Corps flood control projects, be amended to provide that "Federal reclamation laws shall govern the disposition for domestic or industrial uses of surplus water from any reservoir utilized for irrigation purposes pursuant to section 6 of this Act" (*id.* at 311-313). This amendment would have had the practical effect of giving the Bureau of Reclamation *exclusive* control over surplus water at all Corps reservoirs that are utilized for irrigation purposes (see *id.* at 457-458). Secretary Ickes also suggested that the language of Section 6 be modified to conform with "various technical features of the Federal reclamation laws" (*id.* at 313) including the fact that those laws "are largely designed to authorize a system of contractual relationships" (*id.* at 458).

247, *supra*, at 1. This approach led to the comprehensive joint plan for six mainstem reservoirs that would each serve "the present and ultimate requirements of flood control, irrigation, navigation, hydroelectric power, and other uses" (*id.* at 3). See U.S. Br. 11-12.

Shortly thereafter, the Senate debated H.R. 4485. It adopted, with slight modifications, the Senate subcommittee's versions of Sections 6 and 8. Having resolved these general issues, the Senate then addressed the specific question of coordinating the Army's and the Interior Department's interests in the Missouri River Basin. It removed the Corps' Missouri River Basin project from the general list of Army flood control projects and created an entirely new provision—Section 9—that authorized the Pick Plan and the Sloan Plan, as coordinated by the Corps-Bureau joint report. See 90 Cong. Rec. 8553 (1944). Following a House-Senate conference, Congress passed the Senate version of H.R. 4485, including Section 9, thus approving the Pick-Sloan Plan. See U.S. Br. 12-14.

As this description shows, Sections 6, 8, and 9 serve quite distinct functions. Sections 6 and 8 are non-specific provisions of an omnibus flood control Act that guide the Army's general administration of its vast array of flood control projects.[9] Section 6 gives the Army general authority to supply "surplus water" from Army reservoirs, and Section 8 permits the Army to make future assignments of Army reservoirs for reclamation use. Section 9, by contrast, approves a specific, comprehensive and unique inter-agency plan—set forth in the Pick Plan, the Sloan Plan, and the Corps-Bureau joint report—for design, construction, and administration in the development of the Missouri River Basin's water resources. That plan envisions that the Army shall administer the flood control aspects of the program in accordance with its empowering statutes, including Sections 6 and 8, and that Interior shall administer the reclamation aspects of that program in accordance with federal reclamation

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[9] Respondents give the misleading impression that the Flood Control Act of 1944 was concerned strictly with the Missouri River Basin. See, *e.g.*, KCS Ry. Br. 13 ("Congress enacted the Flood Control Act of 1944 in a careful effort to provide for wise conservation and development of the water resources of the Missouri River Basin."); see also *id.* at 16-17.

law. Contrary to respondents' contentions, there is simply no conflict, under our interpretation of the Flood Control Act, among Sections 6, 8, and 9.

b. *Section 6.* Respondents attempt to create a conflict by characterizing Section 6 as giving the Army *exclusive* authority to supply water from the Missouri River mainstem reservoirs for industrial use.[10] That attempt founders on the plain language of the statute. Section 6, which provides that the "Secretary of War is authorized to make contracts * * * for domestic and industrial uses for surplus water" (58 Stat. 890) gives the Army unquestioned power over "surplus water" at Army-operated reservoirs, but it does not provide that the Army's power is exclusive. Nothing in the legislative history suggests that the Army's general authority to supply "surplus water" overrides Interior's specific authority, under the Pick-Sloan Plan, to administer the waters stored for irrigation purposes at the Missouri River mainstem reservoirs.[11]

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[10] Contrary to respondents' present reliance on the Army's authority, they have previously asserted that the Secretary of the Army has no authority to provide Lake Oahe water for industrial use because "the waters to be committed from the Oahe reservoir are not 'surplus,' and their diversion from Oahe would adversely affect navigation, hydropower operation, specifically authorized project purposes, and other existing lawful uses of water" (KCS Ry. Third Amended Complaint para. 101; see also Mo. Amended Complaint para. 85). The Army has since concluded that the Missouri River reservoirs may indeed contain "surplus water" (U.S. Br. 38 n.58). There is no reason to believe that respondents would be satisfied if the Army, rather than Interior, provided ETSI with water for its industrial use.

[11] Indeed, the House debate suggests that Army's authority would not be exclusive. See U.S. Br. 8 n.11, 25-26 nn.42-43. Respondents contend that the Army's authority must be exclusive because the Senate subcommittee rejected Secretary Ickes' suggested amendment of Section 4 of the House bill (see note 8, *supra*), which would have given Interior *exclusive* authority to supply surplus water from *all* Army dams serving irrigation functions. See Mo. Br. 19-20; KCS Ry. 37-38. This argument is logically infirm: Congress could refuse to give Interior exclusive authority at all Army reservoirs that serve irrigation functions, but nevertheless give Interior concurrent authority at the Missouri River mainstem reservoirs, which the Army and Interior jointly administer based on a functional division of authority. Indeed, Congress, through the enactment of Section 9 and the consequent approval of the Pick-Sloan Plan, did just that. Section 9 and the Pick-Sloan Plan envision that the

As we explained in our opening brief (at 24-25, 34-39), the Pick-Sloan Plan envisioned that the Army and Interior would concurrently exercise authority over the Pick-Sloan reservoirs and would respond flexibly to the Missouri River Basin's needs. The Army and the Interior Department can best administer these multiple purpose reservoirs if both agencies have authority to supply otherwise unutilized water to its best possible use. Those agencies have long agreed on the need for appropriate consultation with each other before providing water service from the mainstem reservoirs (J.A. 136-137, 140; see U.S. Br. 16 & n.32, 47 n.70) and interior did so in this case (*id.* at 18). They should be allowed to determine, through consultation and coordinated review, which agency is best suited to supply water in light of the functional division of authority and the particular circumstances presented. This approach assures that full consideration is given to the interests of *all* the Missouri River Basin's water users.

c. *Section 8.* Respondents' attempt to create a conflict between Sections 8 and 9 is equally unavailing. Section 8 provides that if the Secretary of the Army "hereafter" makes a determination that an Army-operated reservoir may be used for irrigation purposes, the Secretary of the Interior may construct, operate and maintain "additional works in connection therewith" provided that he first prepares a report and receives congressional authorization (58 Stat. 891). That provision, which specifies the procedure the Army and Interior must follow when *adding* irrigation works to Army reservoirs, has no direct bearing in this case. Congress, through its enactment of Section 9 and its approval of the Pick-Sloan Plan, authorized the construction of irrigation works at Lake Oahe.[12] Those partially completed

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Army will exercise its authority in accordance with Section 6, while Interior will exercise its authority under the federal reclamation laws.

[12] Section 9(a) authorized the "initial stages" of the Pick-Sloan Plan, and Section 9(e) provided that "$200,000,000 is hereby authorized to be appropriated for the partial accomplishment of the works to be undertaken under said plans by the Secretary of the Interior" (58 Stat. 891). That authorization process involved the same steps set forth in Section 8: the Army determined that its reservoirs could be used for reclamation purposes (H.R. Doc. 475, *supra*, at 3-4); the Secretary of the Interior prepared a report, in

works have now been either postponed or abandoned. See U.S. Br. 15 n.29. Neither the Army nor Interior is seeking to add "additional works" at Lake Oahe; instead, Interior is attempting to assure that Lake Oahe's preeminent existing reclamation feature—namely its massive irrigation storage capacity—is optimally applied to a permissible.reclamation use. Thus, Section 8 is simply not relevant here.[13]

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accordance with the reclamation laws, describing the proposed development (S. Doc. 191, *supra*); and Congress, in Section 9, authorized the works (58 Stat. 891).

[13] Respondents contend Section 8 indicates that "the reclamation laws do not apply to Army-controlled reservoirs unless and until Interior completes additional works for irrigation purposes after Army approval" (KCS Ry. Br. 18 (capitalization omitted)). But that argument finds no support in Section 8's language or legislative history. There is no basis for respondents' supporting contention (Mo. Br. 25-27; KCS Ry. Br. 39-41) that Secretary Ickes' proposed amendment to Section 6 of the House bill (which later became Section 8 of the Flood Control Act) ceded away Interior's authority (under the subsequently formulated Section 9) to administer the reclamation features of the Pick-Sloan Plan. That amendment, which replaced language allowing Interior to "prescribe regulations for the use" of irrigation storage with language allowing Interior to "construct, operate, and maintain" additional irrigation works, did not signal some "radical" narrowing of Interior's authority at the mainstem reservoirs. As we have pointed out (note 8, *supra*; U.S. Br. 28 n.45), that change simply reflects the fact that Interior customarily does not prescribe regulations for the *use* of irrigation storage; rather it supplies stored water through water service contracts. As Secretary Ickes himself explained (*H.R. 4485 Senate Hearings* 458):

> That section as it now stands provides for the application of the Federal reclamation laws to the irrigation features of Army reservoir projects. However, it is not drafted in a way that ties in with the basic provisions of the reclamation laws in all pertinent respects. For example, it speaks of those laws as though they involved merely the imposition of regulations, whereas in truth they are largely designed to authorize a system of contractual relationships.

Thus, Secretary Ickes' amendment, which was proposed and adopted prior to the formulation and adoption of Section 9, was basically technical in nature and certainly was not intended to limit the Secretary's authority under the Pick-Sloan Plan. Respondents do not, and cannot explain why Congress or Secretary Ickes would have wanted Interior to complete construction of presently unneeded irrigation works before putting available irrigation water to a beneficial reclamation use.

3. *The Reclamation Reform Act of 1982 does not limit the Secretary's authority under Section 9.* Respondents travel still further afield in challenging the Secretary of the Interior's interpretation of Section 9. They contend that Section 212 of the Reclamation Reform Act of 1982, 43 U.S.C. 390*ll*, casts a pall over Interior's authority to enter into industrial marketing contracts for water stored in mainstem reservoirs (Mo. Br. 23-24; KCS Ry. Br. 41-42). This argument, too, founders upon plain language. Section 212(a) provides that reclamation law shall not "be applicable to *lands*" receiving benefits from Corps constructed facilities unless certain conditions are met (43 U.S.C. 390*ll*(a) (emphasis added)). That provision, whose primary purpose was to exempt certain land owners from the reclamation law's acreage limitations (S. Rep. 97-373, 97th Cong., 2d Sess. 10, 15-16 (1984)), has no application to this case, which does not involve the application of reclamation law to land.[14]

Indeed, Section 212(b), 43 U.S.C. 390*ll*(b), which preserves existing repayment requirements at Corps-constructed dams, including Lake Oahe, supports our contention that the water marketing provisions of the reclamation law remain in force at the Missouri River mainstem reserviors. That subsection was added "to insure that the Secretary's authority to contract with water users in order to recover costs is maintained" (128 Cong. Rec. 16612 (1982) (Sen. Wallop)). See also S. Rep. 97-373, *supra*, at 12, 16. As we explained in our opening brief (at 48 n.72), Congress requested comments from the Interior Department and the Army concerning Section 212's practical effect, and received material that "provides, in the most specific detail, the information about the projects that would be affected and those that would not" (128 Cong. Rec. 16605 (1982) (Sen. Moynihan)), including information concerning Interior's in-

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[14] Respondents themselves interpret Section 212 as simply limiting the application of Section 8 of the Flood Control Act (see Mo. Br. 23-24; KCS Ry. Br. 41-42), a provision that we have already shown has no application to this case. The Senate Report expressly states, "The specific legislation dealing with the project in question must be consulted to determine the applicability of the reclamation law" (S. Rep. 97-373, *supra*, at 16). The "specific legislation" in this case would be, of course, Section 9 of the Flood Control Act.

dustrial water marketing program.[15] Thus, far from renouncing Interior's water marketing activities, Congress, by all indications, supported that program.

3. *The Secretary's interpretation is entitled to deference.* Respondents recognize that the courts must give effect to a reasonable agency interpretation of a statute unless that interpretation is inconsistent with a clearly expressed legislative intent (see, *e.g.*, *Japan Whaling Ass'n* v. *American Cetacean Society*, No. 85-954 (June 30, 1986), slip op. 11), but contend that the Secretary's interpretation of his authority under Section 9 is not entitled to deference here. See Mo. Br. 43-45; KCS Ry. Br. 43-49. They urge that the Secretary's interpretation is not consistent with the Act itself, or with the Interior Department's and the Army's past interpretation of the Act. These contentions are plainly and demonstrably wrong. Indeed, as we explained in our opening brief (at 44-50), the Secretary's interpretation is entitled to special deference in this case.

We have already shown that the Secretary's construction of the Flood Control Act is reasonable and, indeed, compelling. Respondents' suggestions that the Interior Department has taken inconsistent positions on Section 9 are demonstrably erroneous. Respondents rely almost exclusively (Mo. Br. 34 n.41;

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[15] The Bureau stated that Section 212(b) would "assure that the Secretary of the Interior's authority to contract with water users for irrigation water supplies from Corps of Engineers projects continues in effect and is not inhibited in any way" (128 Cong. Rec. 16607 (1982) (letter from Comm'r Broadbent to Sen. Moynihan)). The Army further explained that Missouri River mainstem reservoir costs are allocated, in part, to irrigation and that a "portion of the mainstem storage space set aside for irrigation has been contracted for by industrial water users for interim water supplies" (*id.* at 16611 (letter from Gen. Heiberg to Sen. Moynihan)). See also *id.* at 16614 (letter from Dep. Ass't Sec. of the Army Dawson) (noting that Section 212(b) "preserved the repayment requirements intended by Congress for irrigation storage at Corps' projects," that Interior "is continuing its efforts to identify customers for water stored for irrigation purposes at Corps' projects" and that no legislative enactment is "necessary or advisable to expedite this effort"). Thus, respondents are plainly wrong in contending (KCS Ry. Br. 42 n.47) that Congress was not aware of the Interior Department's highly publicized water marketing program. The fact that the ETSI contract was not specifically mentioned (*ibid.*) – because it did not exist – does not gainsay our submission.

KCS Ry. Br. 47 n.54) on the Interior Department's 1957 congressional testimony and accompanying documents concerning Pick-Sloan Plan hydropower revenue and cost allocations.[16] But the 1957 testimony actually *supports* the Secretary's interpretation. The Interior Department, applying the same principles advocated here, explained that Section 9 and the Pick-Sloan Plan, rather than the Flood Control Act's general hydropower provision (§ 5, 58 Stat. 890), govern the hydropower allocations from the Missouri River mainstem reservoirs.[17] Indeed, as we explained in our opening brief

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[16] See *Missouri Basin Water Problems: Joint Hearings Before the Senate Comm. on Interior and Insular Affairs and the Senate Comm. on Public Works*, 85th Cong., 1st Sess. Pt. 1 (1957) [hereinafter *1957 Senate Hearings*]. Respondents also cite (KCS Ry. Br. 47-48 n.54) a 1981 statement concerning Section 8 that on its face is neither inconsistent with our position nor relevant to this dispute.

[17] See *1957 Senate Hearings* 313-417 (testimony and supporting documents of Ass't Solicitor Weinberg). The Assistant Solicitor stated that "the key to the matter is to be found in an examination of the plans that were authorized and adopted by section 9" (*id.* at 314) and that Section 9(a) "must be read together with (9c)" (*id.* at 324). He agreed with Senator Case (who participated in the 1944 debates) that "Section 9(c) does not go to the physical structures only" (*id.* at 318), and later cited the functional division of authority set forth in the Pick-Sloan Plan (*id.* at 327-328). He further explained that "it was the conclusion of the Secretary that section 5 had no application" to hydropower cost allocations under the Pick-Sloan Plan (*id.* at 315), and that "we are consistent on the view that section 5 does not apply in the Missouri River Basin" (*id.* at 323). See generally *id.* at 344-353 (written statement).

Respondents, completely misreading the Assistant Solicitor's testimony, suggest that he advised Congress that the mainstem reservoirs were not "reclamation developments" for purposes of Section 9(c) (KCS Ry. Br. 47-48 n. 54). That Assistant Solicitor actually said something entirely different. He explained (*1957 Senate Hearings* 318-319) that Section 9 would govern the application of hydropower revenues, that Section 9(c) required that those receipts be deposited in accordance with the reclamation laws, and that the relevant reclamation law was the Hayden-O'Mahoney Amendment, which requires (with certain exceptions) that all moneys received from "irrigation projects * * * *constructed* by the Secretary * * * shall be covered into the reclamation fund" (43 U.S.C. 392a (emphasis added)). The Assistant Solicitor continued, "Since the Bureau of Reclamation or the Secretary of the Interior has not *constructed* Gavins Point Dam, Oahe Dam, or the other mainstem-dams, the Hayden-O'Mahoney amendment does not apply" (*1957 Senate Hearings* 319 (emphasis added)). He later explained that Interior would allocate certain

(at 42-44), the Interior Department's financial management practices have always recognized, and the power rates for the midwestern states have long reflected, the unique hybrid nature of the Pick-Sloan facilities.

Respondents' contention that the Secretary's construction "has been challenged consistently by the Army" (KCS Ry. Br. 45; see Mo. Br. 44) is simply incorrect. The Department of the Army has quite properly concluded that the Secretary of the Interior's interpretation of his authority is entitled to deference, provided that the determination does not interfere with the Army's responsibilities under the Pick-Sloan Plan. See U.S. Br. 46-47.[18] Plainly, the Army General Counsel, who has signed this brief, speaks on behalf of the Army. Respondents, in turn, have no authority to speak on its behalf.[19]

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revenues to the reclamation fund on a proportionate basis reflecting the hybrid nature of those reservoirs (*id.* at 319, 341-342). Thus, it is quite clear that when the Assistant Solicitor indicated that the mainstem reservoirs were not "reclamation development *constructed* by the Secretary of the Interior" (*id.* at 319 (emphasis added)), he was discussing the application of the Hayden-O'Mahoney Amendment, and was not suggesting that the Secretary's activities at those reservoirs fell outside of the coverage of Section 9(c).

Respondents also state (Mo. Br. 34 n.41; KCS Ry. Br. 47-48 n.54) that the Secretary's present position is inconsistent with a 1950 Interior memorandum signed by Solicitor White (see *1957 Senate Hearings* 366). Respondents neglect to mention that Secretary of the Interior Chapman rejected Solicitor White's analysis at the time it was rendered (see *id.* at 337-338). As the Assistant Solicitor explained, "the law commits the matter to the Secretary, and this is the position that *the Secretary* took" (*id.* at 338 (emphasis added)). Respondents also cite a 1946 memorandum from a Bureau of Reclamation assistant chief counsel to a branch director (*id.* at 389). There is no evidence that the contemporaneous Secretary was even aware of this nonauthoritative internal memorandum.

[18] The Army has long followed the practice of giving deference to the Secretary of the Interior's interpretation of his authority. For example, Assistant Solicitor Weinberg observed in 1957 that the Army had not expressed a view on the treatment of irrigation cost allocations because "that is a matter in which the Army properly deferred to the Department of the Interior" (*1957 Senate Hearings* 315).

[19] Throughout this litigation, respondents have claimed to present the Army's views, relying on nonauthoritative documents, such as a one and one half page internal memorandum from a Corps assistant chief counsel (whom respondents incorrectly identify as an "Army Assistant General Counsel"). See Mo. Br. 44 n.50.

Finally, we note that respondents cannot dispute that the Flood Control Act of 1944 is written in unusually broad language that vests the responsible agencies with broad discretion, that the Interior Department was intimately involved in the creation of the legislation program and therefore has special insight into its proper interpretation, or that decision as to the meaning of the statute involves reconciling conflicting policies and requires more than ordinary knowledge of the subject matter. See U.S. Br. 45-46. This case thus presents precisely the situation contemplated in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), where an agency is entitled to deference.

5. *The Secretary's interpretation promotes Congress's basic objective of a fair and efficient utilization of the Missouri River Basin's resources.* Respondents' elaborate arguments simply ignore what lies at the very heart of this dispute. Congress approved the Pick-Sloan Plan to serve the needs of the entire Missouri River Basin by, among other objectives, providing the arid and semi-arid upper basin states with irrigation water while promoting commerce and protecting the lower basin states from seasonal floods. As the upper basin states explain (Amicus Brief for the States of Montana, North Dakota, South Dakota, and Wyoming), they have dedicated a vast expanse of productive lands for construction of the massive mainstem reservoirs that presently protect the more humid lower basin states from once devastating floods. They simply seek a reasonable benefit from their sacrifice—the opportunity to put a portion of those flood waters stored within their borders to a beneficial use.[20]

Respondents pay mere lip service to the *national* objectives that motivated approval of the Pick-Sloan Plan. See, *e.g.*,

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[20] The ETSI contract involves a relatively small diversion. As the Corps of Engineers' Environment Assessment stated: "Total annual evaporation from Lake Oahe averages 909,000 [acre-feet] or 2,490 [acre-feet per day]. This is 17 times the ETSI depletion. Ten hot September days, at a rate of 5,600 [acre-feet per day] could evaporate a volume equivalent to the entire annual ETSI depletion volume" (C.A. App. 365).

S. Doc. 191, *supra*, at 10.[21] Their legal objections reflect, at bottom, a parochial unwillingness to share the Missouri River Basin's resources for the benefit of all. We submit that Congress, which approved a flexible program designed to meet the evolving water resource needs of the entire basin (see U.S. Br. 34-37), did not mandate the inequitable and inefficient result that respondents seek here.

CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted

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[21] The lower basin states, which receive about twice the rainfall of the upper basin states (see *The World Almanac and Books of Facts* 750 (1987)), object to the modest ETSI diversion on the ground that the water should remain available for their existing and future use (Mo. Br. 3, 15, 21 & n.26; Mo. Amended Complaint para. 85). The Kansas City Southern Railroad, which transports coal and other products in the Missouri Basin, objects to the ETSI contract on the dubious ground that the diversion might affect its water supply at its corporate headquarters (KCS Ry. Br. 8 n.12).

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